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IN THE

Supreme Court of the United States

OCTOBER TERM, 1971

No. 70-5276

ALBERT D. MUREL, *et al.*,
Petitioners,

v.

BALTIMORE CITY CRIMINAL COURT, *et al.*,
Appellees.

REPLY BRIEF OF PETITIONERS

KARL G. FEISSNER
WILLIAM L. KAPLAN
THOMAS P. SMITH
FRED R. JOSEPH
ANDREW E. GREENWALD
WALTER E. LAAKE, JR.

Feissner, Kaplan and Smith
6401 New Hampshire Avenue
Hyattsville, Maryland 20783

Attorneys for Petitioners

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REPLY BRIEF OF PETITIONERS

The State, in its Brief, has taken advocating umbrage with certain factual assertions made by the Petitioners, as well as the Petitioners' efforts to properly place this cause in an appropriate judicial framework. Petitioners respectfully suggest that through balanced logistical mobility the State has misunderstood the record in the Court below, or misunderstood the total impact of the Defective Delinquent Law. The Petitioners respectfully answer the propositions as follows:

I.

THE DEFECTIVE DELINQUENT ACT APPLIES TO NEARLY ALL PERSONS TRIED FOR ANY CRIMINAL OFFENSE.

Under the provisions of the Defective Delinquent Act, in Section 6 thereof, it is stated that requests for examination may be made of any person coming under several categories, and the State has suggested, in its Brief, that this indicates a desire of the Legislature of Maryland to have it apply to only a select group of persons. Such is emphatically not the case.

Under the provisions of Article 27, Section 690 of the Annotated Code of Maryland, previously cited at page 23 of the Petitioners' Brief, it is seen that offenders in the State of Maryland are sentenced to the jurisdiction of the Department of Corrections and not to a particular institution. These provisions of Article 27, Section 690, apply in the District Courts, Trial Magistrate Courts, as well as the Courts of *nisi prius*, criminal jurisdiction at the Circuit Court level. It follows, therefore, that any and all misdemeanors and felonies in the State of Maryland are punishable by imprisonment in the penitentiary, if the Department of Corrections so determines under the provisions of Article 27, Section 689. Thus, it can be seen that the select class suggested by the State, as warranted under the provisions of Article 6 of the Defective Delinquent Act, does not exist and any misdemeanant can be recommended for Patuxent Institution whether it be a serious offense, or, indeed, a minor offense, and the State's proposition that the Act applies only to a recognizable class is without merit.

The Petitioners further contend that the amendments to Section 15 of the Act, which suggests that the Act is not to affect Magistrate's Courts, is inapplicable since, if the Defendant takes a trial by jury, then Section 15 is not applicable. This seems to suggest that as a punishment for taking a jury trial, the State can, if it wishes, send the Defendant to Patuxent Institution for examination. The Petitioners are

unaware of a proper proposition of law which allows or sustains such an extraordinary power of the State for defendants exercising the rather cherished right to trial by jury.

II.

THE PETITIONERS HAVE NOT MISSTATED THE FACTS IN THEIR BRIEF AS SUGGESTED BY THE STATE.

The Appellees contend, in its Brief, that the Maryland definition of a defective delinquent in no way depended on its validity in the use of such terms as "sociopaths" or "psychopaths." In fact, the State goes on to say that at the Patuxent Institution group therapy is the predominant modality since the Institution's experience shows that a defective delinquent does not relate well to the one-to-one relationship with a therapist. In fact, the testimony appearing at JA Md. 774-775 is that the "sociopath" does not relate well in the one-to-one relationship with the therapist but can derive more benefit from treatment in a group sitting. In addition, Dr. Guttmacher, in his testimony before the Circuit Court for Prince George's County, when asked whether or not a sociopath was a defective delinquent as defined by the Maryland Act, stated that if a sociopathy has manifested itself by repeated dagnerous criminal behavior, he is (JA Md. 166).

Petitioners in no way misconstrued the statements of Dr. Guttmacher regarding the effect of having an improper person as the head of the Patuxent Institution. Dr. Guttmacher stated that it is very important that you have a good Director of the Institution, because the Director sets the pattern and it would be possible to get some individual in who would be out of step with the whole institution and would want to go his own way. Continuing, Dr. Guttmacher stated that it would be very destructive if we had somebody with poor judgment, someone like that could do a lot of harm (JA Md. 267). This was important, Dr. Guttmacher related, because the Director of the Institution would be the person who was applying the law and interpreting it.

Appellees contend that the Petitioners misconstrued the statement from the "*Maryland Defective Delinquency Law*" (JA 4, 501-503). That article, written by the Director of the Patuxent Institution and others, leaves no room for misinterpretation when it states:

> "Since no individual can be reasonabley said to have achieved perfect emotional balance, *whatever that might mean*, we could presumably infer that every individual shows some degree of emotional unbalance." (JA 4, 501).

In addition, the articles goes on to state that it is possible that a disproportionately large segment of the criminal population may be referred for examination. (JA 4, 502). The point to be made here is not whether or not the Petitioners have misconstrued the statement from this article, the question is that there does exist the possibility that a disproportionately large percentage of the criminal population may be referred to the Patuxent Institution for examination. What may be done in practice at any particular point in time is irrelevant to the question of what may be done, and may happen. Again, the Director in that article went on to say that it was important that the Director maintain a continuous professional liaison with the courts in a constant attempt to clarify the psychiatric criteria of defective delinquency. The fact that the Director must maintain a continuous liaison to clarify the psychiatric criteria would seem to show that the definition is not definitive, as well as would relate back to the fears expressed by Dr. Guttmacher (JA Md. 166) regarding the person of the Director himself.

Finally, Appellees argue that the Petitioners misconstrued the article, "*The Maryland Defective Delinquency Law; An Eight Year Follow-Up.*" (JA 4, 506-509). There is nothing in that article to be misconstrued. The Director, with candor, states that court testimony is a major and time-consuming part of the Institution's activities, citing that the Director alone has testified in nearly a thousand cases. (JA 4, 506). There is no misconception in the views that Dr. Boslow held when he wrote the article in question regarding juries. There

was nothing susceptible to being misconstrued about his statement that juries are susceptible to emotional appeals and have no feeling of responsibility. In addition, Dr. Boslow stated in that article that the Defective Delinquency Law had a dual purpose, i.e., to keep the emotionally disturbed and dangerous individuals out of circulation and to treat them when appropriate. (JA 4, 508). There is nothing that can possibly be misconstrued by the phrase that they should be treated when appropriate, therefore, removing from the role of mandatory treatment those who are at Patuxent for an indeterminate period of time whiling away the hours until they die.

While it is true that the enemy of society is crime and its causes and that everyone wants to see the problems of our criminal system alleviated, yet we must bear in mind and be wary and not fall prey to the words of Friedrich Nietzche:

> "How good bad music and bad reasons sound when one marches against an enemy." *Kaufmann, The Portable Nietzche.* Viking Press (N.Y., 1954), at 91.*

III.

THE STATE HAS MISCONSTRUED THE PHILOSOPHICAL FRAME OF REFERENCE BY WHICH THIS CASE WAS DECIDED IN THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF MARYLAND, AND THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT.

It is noteworthy that the United States District Court for the District of Maryland, when considering this matter stated in its opinion:

> "This Court feels that the Fourth Circuit's concern (which was not and is not shared by the writer) is fully overcome in the *Daniels* Opinion." *Sas v. Maryland*, 295 F. Supp. 389, at 396.

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*See Stone, Alan, A., M.D., *Discussion of Crime Prevention by the Indeterminate Sentence Law.* Appendix A attached.

It is patently obvious that the writer did not share the view of the United States Court of Appeals for the Fourth Circuit at the time its view was issued in the case of *Sas v. Maryland*, 334 F.2d 506 (4th Circ., 1964), and was not shared by him at the time that he heard the evidence in the Court below. It is an elementary principle of law that Constitutional rights and liberties are to be given a liberal interpretation and not a grudging interpretation.

Secondly the writer is of the opinion in the United States District Court for the District of Maryland at footnote 12 within his Opinion, after attempting to distinguish certain other cases, stated:

> "This Court can only be thankful that his family does not reside in the District of Columbia." *Sas v. Maryland*, 295 F. Supp. at 405-406.

Again, it is obvious that the writer of the Opinion in the United States District Court for the District of Maryland, entered the cause with a pre-determined view and used the hearing in the Court below as the basis for expounding his personal views, which, unfortunately, did not coincide with those of the United States Court of Appeals for the Fourth Circuit. Unfortunately, the Fourth Circuit, in its Opinion, stated:

> "We affirm on the District Court's opinion. *Sas v. State of Maryland*, District Court of Maryland, 295 F. Supp. 389." *Tippett v. Maryland*, 436 F.2d 1153 at 1155.

The Fourth Circuit then adopted the holdings of the United States District Court for the District of Maryland and did not answer any of the many contentions set forth by the Petitioners, but, rather, set forth general pleas for greater understanding in the field of penology, with which no one can necessarily disagree. Unfortunately, the learned Court did not seek to distinguish or discuss the many cases cited by Petitioners or the Amicus Curiae, and it was left to the

dissenting opinion to discuss some of the issues raised in the Petitioners' Brief. It follows, therefore, that the multitudinous citations by the State, in its present Brief, wherein they rely upon the opinion of the Fourth Circuit and the United States District Court of Maryland, are merely a propagation of misunderstanding, especially when one considers the view of the Fourth Circuit when it discussed the burden of persuasion and it stated:

> "However meaningful the distinction may be to us as Judges, however, it is greatly to be doubted that a jury's verdict would ever be influenced by the choice of one standard or the other." *Tippett v. Maryland*, 436 F.2d at 1158-1159.

It is rather obvious that the learned United States Court of Appeals for the Fourth Circuit is suggesting what has been suggested throughout these proceedings by the State, i.e., that we, the people, do not have sufficient sophistication and understanding to understand what a wonderful thing the State of Maryland is doing for us. This type of blue ribbon philosophy is abhorrent to a democratic government but consistent, perhaps, with enlightened despotism.[1]

IV.

THE RIGHT OF HABEAS CORPUS DOES NOT APPLY AS FULLY AS SUGGESTED BY THE STATE.

While it has always been admitted by the Petitioners that under the provisions of Section 10(c) of the *Act* that the right to petition for habeas corpus remains, it follows as clearly as day from night that application for further review as to the status of the defective delinquent can only be made every three (3) years. The *Act*, Section 10, Subparagraph B,

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[1] The members of this Court must have chest puffing pride with the results of *Operation Baxstrom, United States ex rel. Schuster v. Herold*, 410 F.2d 1071, 1082 (2nd Cir., 1969).

Indeed, it has been specifically found in *Sas v. Maryland, Op. Cit.* and *Brown v. Director of Patuxent*, 224 Md. 635, 165 A.2d 895 (1960), that under the Maryland Law, a defective delinquent cannot raise the question of his defective delinquency on the merits in a habeas corpus proceedings. He may only challenge the question of whether, in fact, a valid judicial order was issued by a Court having jurisdiction. The right to question the jurisdiction of the Court is much less meaningful than the suggested proposition set forth by the State that the defective delinquent has the "right" of habeas corpus at any time; such is patently not the case.

V.

THE ACT CLEARLY DENIES EQUAL PROTECTION OF THE LAW BY DENYING THE DEFECTIVE DELINQUENT THE RIGHT OF APPEAL, BUT THAT RIGHT OF APPEAL DOES, IN FACT, EXIST IN ALL OTHER "CIVIL" CASES.

This Honorable Court in *Baxstrom v. Herold*, 383 U.S. 107, 15 L. Ed.2d 620, 86 S.Ct. 760 (1966), specifically held that the Petitioner in that cause was denied equal protection of the law by a procedure under which an individual could be civilly committed to an institution at the expiration of his sentence without a jury review available to other persons civilly committed in the State of New York.[2]

In the cause at Bar. it is noted that the right of appeal lies to the Court of Special Appeals or the Court of Appeals of Maryland (*Maryland Annotated Code*, Article 5, Section 1) from the vast majority of civil cases except the Defective Delinquent Law (Article 31B, Section 11, *Maryland Annotated Code*). Unbelievably, under the Defective Delinquent Law, the Court of Appeals of Maryland has specifically held that a Trial Judge has no authority to grant a Motion For

[2] "Baxstrom thus might be said to require the conclusion that, while prior criminal conduct is relevant to the determination whether a person is mentally ill and dangerous, it cannot justify denial of procedural safeguards for that determination." *U.S. ex rel. Schuster, Op. Cit.* at 1081.

New Trial or a Motion For Judgment, N.O.V., notwithstanding the fact that this exists in all other civil cases. *Creswell v. Director of Patuxent*, 1 Md. App. 8, 226 A.2d 158 (1967). When one recognizes that the Act itself, in Section 11, clearly says that the right of appeal shall be as a matter of grace and not of right, and yet the right of appeal lies for an ordinary property damage accident or breach of contract, it would seem unreal that the State of Maryland would suggest that all persons in the "civil" class are, in fact, being treated equally. This argument, in addition, does away with the State's proposition that *Minnesota ex rel. Pearson v. Probate Court*, 309 U.S. 270, 84 L.Ed. 744, 60 S.Ct. 523 (1940) is authority for the existing Act.

VI.

THE STATE HAS MISCONSTRUED THE HOLDING OF SPECHT v. PATTERSON

In *Specht v. Patterson*, 386 U.S. 605, 18 L.Ed.2d 326, 87 S.Ct. 1209 (1967), this Honorable Court held that the Colorado Sex Offenders Act was unconstitutional because of its procedures in allowing the Defendant to be convicted as a sex offender on the basis of a psychiatric report, which, interestingly enough, had to contain "recommendations as to whether or not the person is treatable." The Court specifically held that in view of the fact that the Colorado Sex Offenders Act makes one conviction the basis for commencing another proceedings to determine whether a person constitutes a threat of bodily harm to the public, or is a habitual offender or is mentally ill, is, in fact, *a new finding of fact* (emphasis supplied), and that, accordingly, in view of the fact that it was a new finding of fact the Defendant was entitled to the relevant protections which due process guarantees in the State criminal proceedings. This Court further held that he must be afforded all those safeguards which are fundamental rights and essential to a fair trial including, but not limited to, the rights to confront and cross-examine the witnesses against him.

This Court specifically held that the Defendant must have an opportunity to be heard, have an opportunity to be confronted with witnesses against him, have the right to cross-examine and to offer evidence of his own, and in addition, that there must be findings adequate to make meaningful any appeal that was allowed. The Court further properly distinguished *Minnesota ex rel. Pearson v. Probate Court, Op. Cit.*, and noted the enlightened views of the Court of Appeals of the Third Circuit Court in *U.S. ex rel. Gerchman v. Maroney*, 355 F.2d 302 (3rd Cir., 1966). In addition, this Court specifically held that the due process requirements, as measured by the Fourteenth Amendment to the Constitution of the United States, are applicable to State proceedings. It is respectfully suggested, therefore, that the distinguished and learned Attorney General of the sovereign State of Maryland has misconstrued or misunderstood the holdings of this Honorable Court in *Specht v. Patterson, Op. Cit.*

VII.

THE STATE HAS MISUNDERSTOOD THE HOLDING OF THIS HONORABLE COURT IN STATE OF MINNESOTA EX REL. PEARSON v. PROBATE COURT OF MINNESOTA.

This Court, in *State of Minnesota ex rel. Pearson v. Probate Court, Op. Cit.*, considered a state statute which specifically defines a psychopathic personality as one having a demonstrable sexual appetite grossly inappropriate for civilized living.

Firstly, the statute discussed by this Court, and discussed by the Supreme Court of Minnesota, was not triggered by a criminal conviction as is the statute in the Maryland Defective Delinquent Law.

Secondly, and of greater significance, perhaps, is the fact that under the Minnesota proceeding, there are critical provisions, before the proceedings are instituted; (1) the facts shall

first be submitted to the County Attorney, who, if he is satisfied that *good cause* exists, (2) shall prepare a petition to be executed by a person *having knowledge of the facts* and shall then present it to the Court. It is, of course, noted that under the Maryland law all that is required, under Paragraph 6D of the Act, is that the request for examination be filed with the Court,, stating the reasons "for *suspecting* or *supposing* the presence of defective delinquency." Compare *Papachristau v. Jacksonville*, No. 70-5030, Supreme Court of the United States, February 24, 1972, at page 13.

It is respectfully suggested by Petitioners that the State's proposition that *Minnesota ex rel. Pearson* supports the Maryland Act is beyond belief. In addition, once there is a finding of psychopathic personality under the Minnesota Act so as to require the care and treatment of the individual, that individual may appeal. In the State of Maryland, as previously suggested in Petitioners' Brief, the matter is wholly discretionary with a Court which has shown itself less than overly concerned with the Constitutional implications of the Defective Delinquent Law.

Again, the construction of the Minnesota statute by its learned Court required three elements; (1) an habitual course of misconduct in sexual matters; (2) an utter lack of power to control sexual impulses, and (3) facts or evidence showing the Petitioner would be likely to attack or otherwise inflict injury on objects of their uncontrolled and uncontrollable desire. This is patently different from a law which allows any person to be examined, and that individual has no right of appeal from the order to be examined, and then the definition is one of anti-social or criminal behavior, and one who is intellectually deficient or emotionally unbalanced. There is a vast sea of difference in a meaningful Constitutional sense between *Minnesota ex rel. Pearson* and the Defective Delinquent Law of Maryland.

The Petitioners respectfully but urgently suggest to this Court that the distinguished Attorney General of the sovereign State of Maryland has misconstrued or misunderstood

the holdings of this Court in *State of Minnesota ex rel. Pearson v. Probate Court, Op. Cit.*

VIII.

THE LAW OF MARYLAND CLEARLY PROVIDES A PUNISHMENT IF A SUSPECTED DEFECTIVE DELINQUENT CITES THE FIFTH AMENDMENT OF THE CONSTITUTION OF THE UNITED STATES.

The State in its Brief has suggested that there are no sanctions against a proposed defective delinquent if he cites the Fifth Amendment of the Constitution of the United States. While it is respectfully suggested by the Petitioners that this has been answered in some fashion by the District Court when it found that the situation of Petitioner Avey was most disturbing, the Petitioners here would much rather meet the issue head on for the Petitioners are in strong agreement that in order for a Fifth Amendment privilege to be violated there must be some showing of compulsion against the individual seeking to take the Fifth Amendment. *In re Gault*, 387 U.S. 1, 18 L.Ed.2d 527 at 567, 87 S.Ct. 1428 (1967), (concurring opinion, White, J.). Accepting the proposition that there must, indeed, be compulsion, the Petitioners again would respectfully invite this Court's attention to *State v. Musgrove*, 241 Md. 521, 217 A.2d 247 (1966), which held that the prospective defective delinquent, if he cited the Fifth Amendment of the Constitution of the United States, could remain at the Patuxent Institution forever, or until such time as he decided to waive his Fifth Amendment privilege.

This becomes critically important in the Maryland proceedings for, as will be shown later, an individual who is recommended for Patuxent has no right to appeal the recommendation to Patuxent; he only has a right for *leave to appeal* after the determination is made by the Institution and at trial. Sufficeth to say at this point, that under the provisions of the *Act*, there is gross compulsion on a prospective defective delinquent under the holdings of *State v. Musgrove, Op. Cit.*, and cases decided since that time, which state that the individual will just remain in Patuxent forever until he waives his Fifth Amendment privilege.

IX.

THE STATE, IN ITS BRIEF, HAS MISUNDERSTOOD THE STATUTORY REQUIREMENTS OF THE MARYLAND DEFECTIVE DELINQUENT ACT AS IT APPLIES TO REFERRALS FOR EXAMINATION.

Under the Maryland Defective Delinquent Act, as we have suggested, any person convicted of any offense in the Circuit Court, or who is convicted in the Peoples Court and then takes an appeal *de novo* or jury trial to the Circuit Court, can be submitted to Patuxent for examination. This includes individuals convicted of the most minor and trivial offense since they could be sentenced to imprisonment in any of the institutions of the State of Maryland.

Nowhere under the Maryland procedures is an individual who is referred to Patuxent given the right to appeal that referral. Indeed, the Court of Special Appeals of Maryland has specifically held:

> "In any event we have heretofore held that an individual has an opportunity to contest his determination of defective delinquency but he has no statutory right to contest the order of the Judge that he undergo such an examination. See: *Wise v. Director*, 1 Md. App. 418." *Bosley v. State of Maryland*, ___ Md. App. ___, 286 A.2d 203 at 208, 209 (1972).

The *Bosley* and *Wise* cases clearly stand for the proposition that in Maryland no one has a right to contest an order of the Circuit Court referring a "supposed or suspected" individual to Patuxent for defective delinquency examination. The abuses that have, and could, take place in the future stretch the imagination of any free-thinking man to the breaking point. An individual convicted of unlawful assembly, who was protesting, perhaps, a political issue of the day; a civil rights advocate who delined to sit in the back of the bus; a housewife, if you will, speeding to the grocery store; all could be referred to Patuxent Institution for possible defective delinquency. There, they must sit until they waive their

rights of self-incrimination under the Fifth Amendment and then be examined, and if, in fact, the examination shows they are a defective delinquent, at that point they have a trial. If the examination shows they are not a defective delinquent, then the State of Maryland apologizes and they are released after first recognizing the folly of their ways in attempting to assert themselves in the State of Maryland.

Conversely, if the civil rights advocate, housewife or other citizen convicted of crime in the State of Maryland stands on the Bill of Rights, then, under *State v. Musgrove, Op. Cit.*, he will never be heard, and he will never have a right of trial, because under *State v. Musgrove, Op. Cit.*, he will stay until he does talk, and if he tries to make any appeal of the order referring him for examination, he is met with the clear holdings of *Bosley* and *Wise* to the effect that Maryland citizens have no right to contest the Order of the Court that a suspect undergo an examination for defective delinquency.

While one recognizes the salutary duty of the Attorney General of Maryland to advocate the cause of the people, it is urged that this cause includes the rights of all the people and the Petitioners respectfully suggest that the Attorney General has misconstrued the holdings of our Court, and misconstrued the scope and breadth of the Defective Delinquent Law as it pertains to referrals for examination.

Indeed, this Honorable Court, in *Groppi v. Leslie*, ___ U.S. ___, 30 L.Ed.2d 732, 92 S.Ct. ___ (1972), specifically held that due process requires, at a minimum, that deprivation of liberty be preceded by notice and opportunity for hearing appropriate to the nature of the case. In the case at Bar, this is sadly lacking.

> "Ir would certainly be dangerous if the legislature could set a net large enough to catch all possible offenders, and leave it to the courts to step inside and say who could be rightfully detained, and who should be set at large." *United States v. Reese*, 2 Otto 214 at 221 (1876), 92 U.S. 214, 221.

X.

THE STATE, IN ITS BRIEF, HAS MISCONSTRUED THE VIEWS OF THE COURTS OF MARYLAND AS TO ANY DUTY OF THE STATE TO ATTEMPT TO SUPPLY ANY MEDICAL OR PSYCHIATRIC TREATMENT.

The State, in its learned Brief, has suggested that, statistics-wise, it can demonstrate that Patuxent, in its milieu therapy, offers some form of treatment to the unfortunates who find themselves confined within that Institution. The State, of course, has overlooked the *nisi prius* decision which found, as a fact, that only four individuals were receiving individual psychotherapy and has overlooked the testimony in the Court below and the documentary evidence that over one-third of the individuals in Patuxent, at the time of the original hearing in the Maryland Courts, were not receiving treatment. Indeed, this was corroborated, in part, by Dr. Boslow himself (JA. Md. 788).

If that, however, was not sufficient, certainly the Supreme Court of the United States should be aware of the holdings of the Court of Appeals of Maryland in the matter of *Tippett v. Director of Patuxent Institution*, 233 Md. 647, 197 A.2d 257 (1964). The Court may recall that Inmate Tippett is the one referred to in the original Brief of Petitioners as the inmate who was at the Institution for a number of years because he was stuttering and there was no person available to help him in his stuttering. It may be recalled further that Inmate Tippett had received less than zealous care for his rights by the Circuit Courts during his several hearings. Perhaps, the judicial coup d'etat of the State's position is found in the clear holding of the Maryland Court of Appeals in *Tippett v. Director, Op. Cit.*, as follows:

> "As to the stuttering there is no claim and no showing that it could be helped or cured by treatment and, in any event, a claim of denial of proper medical treatment has been held to be irrelevant to any cogent issue pertinent to a redetermination hearing." 197 A.2d 257 at 258.

If, in fact, whether or not any treatment is available is irrelevant, and if, in fact, the claim of denial of treatment is irrelevant, *Shields v. Director*, 244 Md. 710, 224A.2d 107 (1966), then, what, in the name of all that is holy, is, in fact, relevant under the Maryland law?[3] Certainly, there is only one clear view which has come from the Court of Appeals of Maryland and that is in *Creswell v. Director of Patuxent*, 234 Md. 620, 198 A.2d 300 (1964), which held that on redetermination hearings of defective delinquents there need be no new facts or new record to show any antisocial conduct, but the redetermination can be made solely on the basis that it is not reasonably safe for society to terminate the confinement or treatment; thus, the learned Attorney General and the sovereign State of Maryland have run a full circle. They have set up an Act which can apply to any citizen depending upon

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[3]The horrible nature of Patuxent, while previously demonstrated in Petitioners' Brief, has been sidestepped with terpsichorean erudition by the State. They have again overlooked the hole (JA Md. 741), the fact that the majority of the "doctors" at the Institution were unlicensed men whose qualifications must, of necessity, be suspect (JA Md. 752); that the expertise of the Board of Review is highly questionable (JA Md. 758-760) and the vicious nature of sexual assaults and rampant homosexuality condoned by Patuxent (JA Md. 761-764) and then compare (JA 4, 147-154), decry the paternalistic attitude of the State of Maryland. Unfortunately, both lower Courts felt that testimony pertinent to the vicious nature of Patuxent might not be fully relevant (JA Md. 554, JA 4, 155). The gassings, beatings, "sensory deprivation" and other aspects of Patuxent's milieu therapy sustain Petitioners' assertion that in fact and in law Patuxent is a horrible mental institution. Those "twice cursed" and placed in confinement for the mentally ill, find new disabilities imposed on existing ones; this is well nigh destructive and calls for the closest scrutiny. *United States ex rel. Schuster v. Herold*, 410 F.2d 1071 (2 Cir., 1969). Alas,

> "Confined with those who are insane, told repeatedly that he too is insane, it does not take much for a man to question his own sanity and in the end succumb to some mental abberation." *Schuster* at 1078.

supposition or suspicion. The accuser need only "suspect or suppose" the presence of defective delinquency, and off the individual is shunted into a horrible[4] mental institution, where he has no hearing until there is a final determination of his mental condition. If, during the period of his examination, he indicates that he is a citizen of the United States of America and entitled to the protections of the Fifth Amendment of the Constitution of the United States, he then finds that he will remain in that Institution forever. If, in fact, he is found under the changing, linguistic tides of the Court of Appeals of Maryland to be a defective delinquent, and he is then placed in that Institution, he then finds for the first time that it is irrelevant whether he can be helped or whether treatment is available, *Shields v. Director, Op. Cit.*,[5] but that he will remain there until it is safe for society to allow him back into the human race. This, we submit, is a penal colony described by its inmates in the article hereinafter referred to as "the hotel of hell." *Washington Daily News, infra.*

The State has cited medical views which were not produced in the Courts below, or the subject of cross-examination. The Petitioners thus feel it appropriate that they, too, might cite that which was not brought to the attention of the Courts below, and the Petitioners' attention has been drawn to a newspaper of general circulation, *The Washington Daily News*, on Friday, March 10, 1972, at page 3, just five days before this Reply Brief was dictated. On page 3 thereof, under thy heading, "Patuxent Bucks Anti-Abuse Ruling," we find in the fourth paragraph the Assistant Director of Patuxent quoted as follows:

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[4]Compare *Nason v. Bridgewater State Hospital*, 233 N.E.2d 908 (Mass. 1968).

[5]Interestingly enough, *Schuster* at 1088 says *Sas v. Maryland*, 334 F.2d 506, 509, holds a Constitutional right to treatment. *Tippett v. State of Maryland*, 436 F.2d 1153 (4th Cir., 1971), does not consider the issue worthy of comment except in the Dissent.

"I don't think they on the court have much respect for us and we certainly don't respect them."

If this is not poignant evidence of the fact that we have a super judiciary in the State of Maryland which is capable of the most cunning abuses known under the false face of rehabilitation, then the Petitioners do not know where else to turn.

It would seem, finally, in the sovereign State of Maryland that we, indeed, have the Bill of Rights, but stamped across the face of the Bill of Rights we find . . .

VOID WHERE PROHIBITED BY LAW.

CONCLUSION

The Petitioners respectfully adopt and incorporate herein by reference their conclusions in their original Brief.

KARL G. FEISSNER
WILLIAM L. KAPLAN
THOMAS P. SMITH
FRED R. JOSEPH
ANDREW E. GREENWALD
WALTER E. LAAKE, JR.

Attorneys for Petitioners
6401 New Hampshire Avenue
Hyattsville, Maryland 20783
270-2626

APPENDIX A

The system of indeterminate sentence described in this paper allows the court to sentence men to a term of one day to life in a total institution. This formidable sentence is passed not on the basis of acts committed, but on the basis of prediction of future danger to society. Thus an awesome power and responsibility falls to the psychiatric staff whose clinical judgment about future dangerous behavior becomes the crucial variable in the system of confinement. This follow-up study, with its glowing commentary buttressed by statistical data, suggests that Patuxent's predictive and treatment procedures work and should be and will be adopted elsewhere. This is the sort of dangerous therapeutic optimism and oversell for which an immediate antidote is appropriate.

First, the statistics demonstrate that of the 740 men labeled defective delinquent over an 11½ year period, Patuxent's staff recommended parole of 156, or roughly 20% who, having been "fully treated," had low recidivism rates. However, we are given no identifying characteristics of this highly selected sample. If, for example, it is composed of men over 45, recidivism comparisons may prove very little about the wisdom of the psychiatric staff, or the value of Patuxent's treatment methods. Later in the paper we learn that parole for this unidentified 20% does not mean complete release; indeed, parole means week-end furloughs, a work-out-live-in program, a study program, and a halfway house. Complete release was allowed to only 30 of the 99 parolees with no new offenses, and to an unknown number of the 57 with new offenses. If we assume an equal ratio of complete releases in the latter group, we find that after 11½ years, Patuxent has recommended that approximately 48 men go free, or less than 7% of the men originally labeled defective delinquent. For the other 13% parole may mean partial confinement.

What I wonder is the statistical significance derived from contrasting national or Maryland recidivism rates with

Patuxent's rates which depend on indeterminate, carefully supervised and restricted parole together with the threat of lifetime confinement?

One would expect that the value of Patuxent's treatment method would be reflected in the percentage of parolees committing new felonies, the more serious crimes. In fact, however, there is no difference between the treated and untreated groups in the percentage of felony offenders or in the percentage of crimes against person, including rape, robbery, and aggravated assault.

The final statistics presented in this paper are those deal with crimes prevented. We are told that Patuxent has definitely prevented at least 1,000 crimes, but the fact is that if everyone had simply been confined permanently, several hundred other crimes could have been prevented.

The critical problem is not and never has been one of finding ways to prevent crimes by former offenders. Since we know that 65% of the men who leave our prisons will be recidivists, we need only keep everyone in prison. In 11½ years we would have prevented millions of crimes without the help of psychiatrists, psychologists, or social workers. We have not taken such action because the critical problem is to prevent crimes while maintaining constitutional rights in a free society.

The statutes which legitimate Patuxent and its methods suggest that psychiatric predictions of dangerousness are a sufficiently reliable and valid foundation on which to build a system of justice. Surely all of us recognize that the clinician's predictive skills do not merit such a grave responsibility, nor do Dr. Hodge's findings in their present form provide support for such a responsibility being deputized to psychiatry.

I must note that nowhere in this paper is there recognition of these fundamental questions, nor is there any mention of the most serious scientific problem of prediction; namely, false positives.

Dr. Hodge, ignoring the scientific and the moral problems, writes: "I predict that 20 years hence historians of psychiatry will regard this statute as one of the major accomplishments of the middle third of the twentieth century." This prediction can only prove correct if in the interim 1984 turns out to be Orwell's 1984. The Maryland statute is unique as Dr. Hodge suggests in that its wording allows the state to hold people thought to be dangerous. Other states, however, achieve the same result by alternative methods; many create some form of civil commitment like Maryland's in which criminal defendants are deprived of freedom without the protections the law usually allows. The rationale for this is that defendants in these instances are not being punished, but treated; not for what they did, but for what they will do. Until we can demonstrate that treatment for the defective delinquent in fact exists, and that the capacity to predict dangerousness exists as well, we cannot encourage government to create more Patuxents.